IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:08-09-2006

Coram:

The Honourable Mr. Justice Elipe DHARMA RAO
and
The Honourable Ms. Justice K. SUGUNA

W.P. No.17389 OF 1999

1.S. Sivakumar
2.M. Raman
3.D. Ramesh
4.R. Anandan
5.M. Ilavarasan
6.S. Raghuraman
7.F. Philip Sagayam
8.M. Joshua
9.S. Alex
10.M. Govindarajan .... Petitioners

:versus:

1. The Deputy Inspector
of Factories, Div. No.1
Chennai 600 006
(Authority constituted under the
Tamilnadu Industrial Establishments
[Conferment of Permanent Status to
Workmen] Act)
2. The Management of
Industrial Oxygen Limited
(now known as Inox Air
Products Ltd.) rep. by its
Managing Director, Chennai .... Respondents

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Petition under Art.226 of the Constitution of India, praying for a Writ of Certiorari, calling for the records of the first respondent in connection with its order Ref.No.5518/98 dated 26-2-1999 and quash the same.

For Petitioners :: Mr. V. Prakash, Sr. Counsel
for Mr. T. Ramkumar
For Respondents :: Mr. AL. Somyaji, Sr. Counsel
for M/s. Venkataraman

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ORDER

Elipe DHARMA RAO, J.

This writ petition has been referred to us to decide the issue whether a petition under the Tamilnadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act (in short 'the Act') can be filed by a dismissed employee or not.

2. The present writ petition was filed challenging the order dated 26-2-1999 passed by the first respondent authority rejecting the application filed by the Industrial Oxygen Company Employees' Union on behalf of the writ petitioners for conferment of permanent status. The writ petitioners claim that they have been working under the second respondent Management continuously for a period of more than 480 days within a period of two calender years and, therefore, they are entitled to the conferment of permanent status.

3. The first respondent rejected the claim on the grounds that the writ petitioners at the relevant point of time were not in the employment of the second respondent Management and, therefore, there was no relationship of master and servant between them; that the writ petitioners were not members of the Union which filed the application seeking permanent status; and that the remedy available to the writ petitioners was only under the Industrial Disputes Act to challenge their non-employment and they cannot seek any relief under the present Act.

4. Before the learned single Judge, learned counsel for the Management, relying on the decision of the Supreme Court in TAMIL NADU CIVIL SUPPLIES CORPORATION WORKERS' UNION v. TAMIL NADU CIVIL SUPPLIES CORPORATION LTD. (2001[3] LLN 86), contended that the writ petitioners cannot maintain their claim for conferment of permanent status when the very basis of their claim that they were employees did not subsist when the application was filed. Learned counsel also relied on the decision of this Court in MANAGEMENT OF ASHOK LEYLAND LTD., CHENNAI v. R. BHASKAR AND OTHERS (2003 (2) LLN 638), wherein the the above said Supreme Court decision was followed.

5. On the other hand, learned counsel for the writ petitioners argued that the above said Supreme Court decision did not lay down any declaration of law that in all cases where an employee had been dismissed from service, he cannot file an application under the Act claiming permanent status. In the above Supreme Court decision, two types of proceedings were initiated by the employees concerned, one claiming permanency under the present Act and another questioning their termination and it was on those peculiar fact-situation, the decision was rendered by the Supreme Court. Learned counsel also argued that in the present case the writ petitioners did not question their non-employment either before the Labour Court or before the High Court. If the

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interpretation adopted by the Management is to be accepted, the entire Act would be rendered ineffective and purposeless as the Management may terminate an employee on receiving any notice or representation from the employee for conferment of permanent status. By dismissing such employee from duty, the Management may successfully foreclose his claim for permanent status under the Act. According to the learned counsel, the Act does not impose any prohibition to approach the competent authority under the Act if he had been dismissed from service. The above said Supreme Court decision was not on the question of maintainability of the application under the Act by an dismissed employee.

6. Yet another decision of the Supreme Court in STATE OF TAMIL NADU AND OTHERS v. NELLAI COTTON MILLS LTD. & OTHERS (1990 CLR 641) was cited before the learned Judge, in which the validity of some of the provisions of the present Act were considered.

7. On hearing the arguments advanced by the learned counsel appearing on either side and on perusing the above said decisions of the Supreme Court as well as judgment of this Court, the learned single Judge was of the view that it does not appear that the Court had declared the law positively to the effect that termination from service would be a complete bar to move the authority under the Tamil Nadu Act. The Supreme Court had taken note of the pendency of another writ petition by the same parties questioning the orders of termination and the Court felt that they could pursue or wait for the conclusion of that petition. The learned single Judge was also of the view that in Nellai Cotton Mills case, cited supra, also the issue as to whether the petition under the Tamil Nadu Act can be set in motion by a dismissed employee or not, did not arise for consideration specifically.

8. The learned single Judge was, therefore, of the view that the issue is considered by a larger Bench and an authoritative pronouncement is made. The matter is thus placed before us for consideration.

9. Sec.2(4) of the Act defines "workman" which reads as follows:

> "workman means any person employed in any industrial establishment to do any skilled or unskilled, manual supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied [and includes a badli workman.]
>
> but does not include any such person,-
>
> (a) who is employed in the police service or as an officer, or other employee of a prison; or
>
> (b) who is employed mainly in a managerial or administrative capacity; or
>
> (c) who, being employed in a supervisory capacity, draws wages exceeding three thousand and five hundred rupees per mensem or exercises either by the nature of the duties attached to the office or by reason of the powers vested in him, functions

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mainly of a managerial nature.

Explanation: Badli workmen means a workman who is employed in an industrial establishment in the place of another workman whose name is borne on the muster rolls of the establishment."

So, "workman" means any person employed in any industrial establishment to do any skilled or unskilled, manual supervisory, technical or clerical work for hire or reward. Further, there must be an employment to do skilled or unskilled, manual supervisory, technical or clerical work. In the present case, the petitioners were employed for the purpose of filling the gas cylinders and they were also engaged in the maintenance work. Therefore, with regard to the employment of the petitioners, there is no dispute that they were "workman" within the meaning of Sec.2(4) of the Act.

10. Coming to the conferment of permanent status to workmen, Section 3 of the Act, which starts with a non-obstante clause, reads as under:

"Conferment of permanent status to workmen:

3(1) Notwithstanding anything contained in any law for the time being in force every workman who is in continuous service for a period of four hundred and eighty days in a period of twenty-four calender months in an industrial establishment shall be made permanent.

(2) A workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike, which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman.

Explanation [I] For the purposes of computing the continuous service referred to in sub-sections (1) and (2) a workman shall be deemed to be in continuous service during the days on which-

(i) he has been laid off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (Central Act XX of 1946) or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the course of this employment; and

(iv) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed twelve weeks

Explanation II: For the purpose of this section, 'law' includes any award, agreement, settlement, instrument or contract of service whether made before or after the commencement of this Act"

Therefore, the requirement is a continuous service for a period of four hundred and eighty days in a period of twenty-four calender months in an industrial establishment. Sub-section (2) contemplates that a workman shall be said to be in continuous service for a period if he is, for that

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period, in uninterrupted service and there are some exceptions to the said sub-section. Explanation I to the said section deals with computation of the continuous period of service. Therefore, the workmen who are in continuous service for a period of four hundred and eighty days in a period of twenty-four calender months in an industrial establishment shall be entitled for claiming permanent status. According to the above said section, the requirement is continuous service for a period of four hundred and eighty days in a period of twenty-four calendar months. Therefore, unless and until continuous service of four hundred and eighty days in a period of twenty-four calendar months is satisfied, a workman cannot claim permanent status as per the above said section. In the present case, the services of the petitioners were terminated by the respondent Management. Therefore, there is no continuity of service of the petitioners with the respondent Management. As seen from the facts and circumstances of the case, when the petitioners have completed 480 days in a period of 24 calendar months, before their dismissal from service by the respondent Management, should have approached the Inspector appointed under Sec.4 of the Act seeking conferment of permanent status based on their length of service. Though they have completed continuous service of four hundred and eighty days in a period of twenty-four calendar months, since their services were terminated by the respondent Management, the petitioners are entitled to claim permanent status only after setting aside the termination order by the competent authority. To claim the permanent status, there must existence of master-servant or employer-employee relationship and the conferment of permanent status is not a condition precedent for setting aside the order of termination passed by the respondent Management.

11. The Nellai Cotton Mills case, cited supra, arose under Sec.3(2) of the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981. Part of the provision of Sec.3(2) of the Act was struck down by the High Court and the State preferred an appeal. During the pendency of the appeal the State amended the Act. The Supreme Court observed as follows:

> "That apart, the view taken by the High Court, in striking down a portion of sub-section (2), in our opinion, cannot be found fault with. Sub-section (2) of section 3 consists of three parts. The first part refers to interruption of service including service which may be interruption on account of sickness or authorised leave or an accident or a strike which is not illegal or a lockout. The second part consists of the portion which has been struck down by the High Court as unreasonable restriction on the right of the employer. The third part refers to cessation of work which is not due to any fault on the part of the workmen. The provisions under the first and the third parts seem to be similar to the terms of section 25-B of the Industrial Disputes Act which also provides for continuous service of the workman. The second part dealing with non-employment and discharge of a workman is distinct from

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the first and the third parts. It refers to the period during which there is no subsisting relationship of master and servant. We agree with the High Court that the word 'non-employment' would include retrenchment as well and a person whose services have been terminated or discharged albeit illegal cannot at all be said to be a person in service, much less in continuous service. Therefore, the period of non-employment or the period after discharge cannot be accounted for the purpose of giving continuity of service. If the discharge is set aside and workman is reinstated by process known to law the workman automatically gets continuity of service. No special provision is necessary for such purposes."

Therefore, from the above said Supreme Court judgment it is understood that to claim permanent status under Sec.3 of the Act, there must be subsistence of master-servant or employer-employee relationship.

12. In Tamil Nadu Civil Supplies Corporation Workers' Union case, cited supra, the workmen who had been employed in the Direct Purchase Centres of the respondent corporation and had rendered more than 480 days of service claimed that they should be confirmed. The respondent corporation refused to confirm them. The workmen filed a writ petition for a mandamus that the provisions of the said Act should be implemented and employees of Direct Purchase Centres who had rendered more than 480 days of service, should be conferred the status of permanent employee. The learned single Judge while disposing of the writ petition directed the employees to approach the Inspector of Labour for determination of the question whether they satisfied the conditions and were entitled to be declared as permanent workers. In the inquiry conducted by the Inspector of Labour it was held that the establishment was not of a seasonal character and the work performed by the concerned workmen was not intermittent. It was not held that the workmen fulfilled the criteria laid down under the Act and were therefore entitled to be made permanent. Challenging the finding of the Inspector of Labour, writ petitions were filed. In the mean time, the respondent corporation terminated the services of a number of workmen. The Union therefore filed a writ petition claiming a blanket injunction that the workers should not be relieved from their work. The writ petition was dismissed holding that the union was not entitled to have a blanket injunction of the nature sought. It was held that the employees could take such action as is available to them in accordance with law. In the writ appeal filed by the union, the Division Bench agreed with the conclusion of the learned single Judge that since the services of the employees had been terminated, it was for the employees to seek their remedies in a manner known to law. Before the Supreme Court it was argued that even though the Division Bench has held that the questions raised in the appeal of the Union were the same as those pending in the writ petition filed by the first respondent, yet the Division Bench has gone on to give a finding that the establishment is of a seasonal character and the work is not intermittent and that these findings would now come in the way of the

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union while defending the writ petition filed by the first respondent. It was therefore prayed that these findings should either be set aside or clarified that those writ petitions would be decided without taking those findings into account. Rejecting the contention, the Supreme Court held as follows:

> "We are unable to accept these submissions. Those findings were given because the individual employees who had filed various other writ petitions, raise these contentions before the Division Bench. As those contentions were raised the Division Bench has answered these contentions. None of the workmen, in whose matters those findings are given, have come up in appeal to this Court. They have accepted those findings. It is, therefore, not open for the Union to claim that those findings should be set aside.
>
> In any event, as stated above, the services of the workmen have been terminated. Therefore, even if the said Act squarely applied and the establishment of the 1st respondent was not of a seasonal character and the work was not intermittent, the remedy would now be to file the appropriate proceedings against the order of termination. In this view of the matter no purpose would be served by dealing with the correctness of the findings given by the Division Bench."

13. Under Sec.4 of the Act the Government may, by notification, appoint such persons or such class of persons as they think fit to be Inspectors for the purpose of this Act within such local limits as the Government may specify. The Inspectors so appointed under Sec.4 are having the powers to enter at all reasonable times and with such assistance, if any, who are persons in the service of the Government or of any local authority as he thinks fit to take with him, any industrial establishment, make such examination of the industrial establishment and of any registers records and notices and take on the spot or elsewhere the evidence of such person as he may deem necessary, for carrying out the purposes of this Act and exercise such other powers as may be necessary for carrying out the purposes of this Act. It is also clear from the Act under Sec.6 of the Act an employer who contravenes the provisions of Section 3 can be punished with fine which may extend to five thousand rupees and in the case of continuing offence with a further fine which may extend to two hundred rupees for every day after the first during which the offence continues. Therefore, the petitioners on completion of continuous service of four hundred and eighty days in a period of twenty-four calendar months and before their dismissal from service by the respondent Management should have approached the Inspector under the Act seeking conferment of permanent status based on their length of service.

14. In view of the above discussion, we are of the considered view that for claiming the permanent status under Sec.3 of the Act, there must be subsistence of the relationship of master-servant or employer-employee

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between the parties and if this requirement is not satisfied even though the petitioners have completed four hundred and eighty days in a period of twenty-four calendar months in the respondent industrial establishment, in the absence of master-servant or employer-employee relationship between the petitioners and the respondent Management as on the date of making of the application under Sec.3 of the Act, they cannot maintain the application under Sec.3 of the Act seeking permanent status. Unless and until the order terminating their services are set aside by the competent authority, they cannot approach the competent authority under the Act seeking conferment of permanent status as per Sec.3(2) of the Act.

15. We accordingly answer the reference holding that a petition under Sec.3 of the Tamilnadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act cannot by filed by a dismissed employee. The writ petition is therefore dismissed. No costs.

Jai

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:

The Deputy Inspector of Factories
Division No.1
Chennai 600 006
(Authority constituted under the
Tamilnadu Industrial Establishments
[Conferment of Permanent Status
to Workmen] Act)

1 CC TO MR.P. CHANDRASEKAR, SR 41639

2 CC TO MR.S. VENKATARAMAN, SR 41732

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ORDER in
W.P. No.17389 of 1999

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